

MEMORANDUM OF AGREEMENT
between the
MANASTASH CREEK IRRIGATORS,
BONNEVILLE POWER ADMINISTRATION,
WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE,
KITTITAS COUNTY CONSERVATION DISTRICT, and
WASHINGTON ENVIRONMENTAL COUNCIL,
regarding
THE MANASTASH RESTORATION PROJECT

The Manastash Creek Irrigators (Irrigators), Bonneville Power Administration (Bonneville), the Washington State Department of Fish and Wildlife (WDFW), Kittitas County Conservation District (KCCD), and Washington Environmental Council (Council) have agreed to: 1.) implement up- and down-stream fish passage improvements at existing water diversion facilities on Manastash Creek used by the Irrigators to divert water under rights they own and that the Washington State Superior Court confirmed in *Ecology v. Acquavella*, Yakima County Cause No. 77-2-01484-5 (*Acquavella*) and 2.) develop and implement a consensus flow enhancement plan for Manastash Creek. These two elements together are hereafter referred to as the "Manastash Project".

RECITALS

1. Parties.

- A. Manastash Creek Irrigators are farmers, ranchers and landowners who are individuals and entities that divert water from Manastash Creek at six (6) different locations on Manastash Creek, a tributary of the Yakima River in Kittitas County, Washington. They are a subset of the Manastash Creek Water Right Holders, a group constituting all water right holders on Manastash Creek. The six diversion locations are referred to herein as follows:
 - 1. The Manastash Water Ditch Association (MWDA), identified in Appendix A, uses the diversion identified in Appendix A.
 - 2. The Keach/Jensen water right holders identified in Appendix B use the diversion identified in Appendix B.

3. The Hatfield Diversion (Hatfield) water right holders identified in Appendix C use the diversion identified in Appendix C.
 4. The Reed Diversion (Reed) water right holders identified in Appendix D use the diversion identified in Appendix D.
 5. The Anderson Diversion (Anderson) water right holders identified in Appendix E use the diversion identified in Appendix E.
 6. The Barnes Diversion (Barnes) water right holders identified in Appendix F use the diversion identified in Appendix F.
 7. All of the above water right holders are collectively referred to herein as Manastash Creek Water Right Holders. The Manastash Creek Irrigators are a subset of this group including representatives of MWDA and individual irrigators from Keach Ditch, Jensen Ditch, Hatfield Ditch, Reed Ditch, Anderson Diversion and Barnes Road Diversion, are signatories to this agreement and are referred to as the Irrigators. The signatories of the respective irrigators to this agreement represent only their own respective interests and do not represent any water right holders that are not signatories to this Agreement.
- B. Bonneville is a federal power marketing agency within the United States Department of Energy. In entering into this Agreement it is exercising its authorities under Section 4(h)(10) of the Pacific Northwest Electric Power Planning and Conservation Act, 16 U.S.C. § 839b(h)(10)(A), and other laws to help protect, mitigate, and enhance fish and wildlife affected by the federal hydroelectric projects in the Columbia River Basin.
 - C. The WDFW is an agency of the State of Washington whose statutory mandate is to preserve, protect, perpetuate, and manage the fish and wildlife of the state.
 - D. The KCCD formed under state law to provide private landowners in Kittitas county with technical and financial assistance to protect and improve the natural resources.
 - E. The Washington Environmental Council is a non-profit group working to protect Washington's environment and natural heritage for current and future generations by advocating for improved state protections and better enforcement of existing laws.
 - F. The individuals and entities described in Recitals (1)A-E are referred to herein as the "Parties."

2. Background.

- A. Manastash Creek is a tributary of the Yakima River which flows into the Yakima River west of Ellensburg. Manastash Creek provides irrigation water to about 4,000 acres; some acres have dual water rights with Kittitas Reclamation District or West Side Irrigating Company. In 2000, steelhead were listed under the Endangered Species Act and the Irrigators approached the KCCD about technical and financial assistance to assist with improvements to Manastash Creek fish passage.
- B. In February 2001, WEC sent a draft notice of intent to sue under the Endangered Species Act to the operators of the diversions, the WDFW, Kittitas Reclamation District and West Side Irrigating Company. Although WEC threatened litigation, it offered to sit down with the affected parties to develop a mutually agreeable plan which would enhance fish passage and instream flows in Manastash Creek while ensuring the viability of local agriculture. The Irrigators deny that they have violated the Endangered Species Act in any manner. Nothing in this agreement or any statement by a party made in the negotiation of this Agreement may be used as an admission in any manner that there has been any non-compliance with the Endangered Species Act or any other laws or regulations.
- C. Initial negotiations involved the Irrigators, WDFW, the Washington Department of Ecology (Ecology), Yakama Nation, Kittitas Reclamation District and the Washington Environmental Council. This group formed the Manastash Steering Committee, which focused on finding a way to eliminate the barriers to fish passage and unscreened irrigation water diversions on Manastash Creek by consolidating some of the irrigation diversions and redesigning the fish passage facilities along Manastash Creek. It was decided to consider flow enhancement as a later, second phase of the project. Through this collaborative effort, the Manastash Steering Committee secured commitments for funding from the State of Washington (\$2.24 million) and Bonneville (\$1.937 million). The funding appropriated by the Washington State Legislature is made available to the project through a grant from Ecology to the KCCD. The Bonneville funds were originally requested by WDFW, but all funds have been contracted to HDR Fishpro for engineering, permitting, design, and construction of fish passage facilities.
- D. In 2006, at the direction of the Manastash Steering Committee, KCCD submitted proposal number 2007-020-00 Manastash Creek Flow Enhancement as part of the FY 07-09 F&W Program Solicitation. In 2007, Bonneville approved funding for project flow enhancement measures in the amount of \$892,998 through FY 09. All parties have subsequently agreed to integrate both passage and flow components into a single project (2003-001-00) and that construction on the fish passage components of the project will proceed when the plan for enhancing flows in Manastash Creek has been developed and adopted by resolution of the Manastash Steering Committee.

NOW THEREFORE, THE PARTIES AGREE AS FOLLOWS:

I. Manastash Fish Passage Improvements

A. Description. As a result of the collaborative process described above, the Parties have developed a plan for improving fish passage that involves implementing the following Manastash Project elements or improvements:

1. At the existing Manastash Diversion, currently used by the MWDA and henceforth referred to as the "Consolidated Diversion":
 - a) The Hatfield, Reed, and Anderson diversions will be relocated and consolidated.
 - b) A fish screen and appurtenant structures will be designed and constructed to screen juvenile fish from the canal/ditch while allowing water diversion by the users to exercise their full adjudicated water rights.
 - c) The check dam and/or stream channel at the diversion facility will be modified, and/or fish passage structures will be installed, to achieve compliance with WDFW fish passage criteria.
 - d) The relocation and consolidation of the diversions are contingent on receiving the necessary approvals to change the point of diversion on applications filed with Ecology. If Ecology doesn't approve one or more of the applications for change in point of diversion, the consolidation will not occur, and Bonneville agrees to then work with the other parties to amend this Agreement to allow construction of individual fish passage improvements at the Hatfield, Reed, Anderson, and Manastash diversions
 - e) The facility design is depicted in Appendix G.
2. At the existing Hatfield, Reed and Anderson diversions, if consolidation is approved,
 - a) The existing diversion facilities will be removed by Bonneville and abandoned by the owners.
 - b) The stream channel will be restored by Bonneville to achieve compliance with WDFW fish passage criteria.
3. At the existing Keach/Jensen diversion,
 - a) A fish screen and appurtenant structures will be designed and constructed to screen juvenile fish from the canal/ditch while

allowing water diversion by the users to exercise their full adjudicated water rights.

- b) The check dam and/or stream channel at the diversion facility will be modified, and/or fish passage structures will be installed, to achieve compliance with WDFW fish passage criteria
 - c) The facility design is depicted in Appendix H.
4. At the Anderson Abandoned Dam, the full span concrete diversion structure will be removed by the KCCD to accommodate fish passage. The stream channel will be allowed to regrade naturally.
5. At the existing Barnes Road diversion,
- a) A fish screen and appurtenant structures will be designed and constructed to screen juvenile fish from the canal/ditch while allowing water diversion by the users to exercise their full adjudicated water rights.
 - b) A roughened channel within concrete walls (henceforth "fish ladder") will be constructed adjacent to the screen and part of the overall new facility, to improve fish passage.
 - c) The facility design is depicted in Appendix I.

B. Effect on Water Rights of Parties to this Agreement. Except for the changes in points of diversion contemplated herein, nothing in this Agreement, nor in any of the references made in this Agreement or its recitals (including specific references to federal legislation, any programs adopted by the Northwest Power and Conservation Council, or pursuant to the Northwest Power Act), shall in any way limit, impair, define, diminish or prejudice any parties water right adjudicated in *Ecology vs. Acquavella* to divert, transmit, and use water for agricultural, irrigation, stock water, fish and aquatic life or domestic purposes, nor authorize any party to hinder, interfere with, or limit any such rights; provided that, nothing is intended to limit the application of Treaty nor federal or state law.

C. Permits.

1. Bonneville will comply with federal law requirements, including National Environmental Policy Act (NEPA) and Endangered Species Act compliance, and obtain federal permits, necessitated by the construction and initial testing of the Manastash Project improvements. Bonneville will provide non-monetary assistance to KCCD, the Irrigators, and any affected state or local agencies for compliance with the Washington State Environmental Policy Act and other state or local permits as needed.
2. Bonneville has completed NEPA and ESA compliance documentation for Manastash Project improvements at Barnes Road.
3. Bonneville will complete the NEPA and ESA compliance documentation for the Manastash Project improvements at the Consolidated Diversion and the Keach/Jensen diversions.
4. The Irrigators using the Consolidated Diversion will apply for the permits and authorizations from Ecology as required for changes in the points of diversion needed to complete the project. The Irrigators agree to cooperate fully and reasonably in requesting and processing the changes in point of diversion.
5. WDFW and the KCCD will apply for any remaining permits and authorizations needed to lawfully proceed with the construction of the diversions and fish passage and screening facilities.
6. No party will have an obligation to defend any other party's environmental compliance, permits, or authorizations as addressed in this section in a court or any other forum.

D. Design. Bonneville will design the Manastash Project improvements, as shown in Appendices G, H, and I that will comply with current fish screening and passage criteria as defined by state and federal standards. The Irrigators consent to allow Bonneville to design these facilities.

1. The Irrigators have the right to review and approve the design and construction plans for the Manastash Project improvements prior to BPA issuing a request for bids. Manastash Project improvements are being completed in stages. As facility design and construction plans are completed for each Manastash Project element (e.g Barnes Road fish screen and fish ladder, the Keach/Jensen fish screen and passage structures, or the consolidated diversion fish screen and passage structures), BPA will provide the plans through the KCCD to the Irrigators associated with each Manastash Project element. If the Irrigators associated with a given Manastash Project element have not rejected that element's design and construction plan in writing within 30 days of receipt

and transmitted such rejection to Bonneville through the KCCD, then Bonneville and the affected Irrigators shall be assumed to be authorized to proceed. If designs are rejected for a particular element the Agreement will, however, continue for the other Manastash Project improvements. Rejected designs may be remanded back to a technical sub committee as appointed by the Steering Committee for review.

2. Bonneville shall make reasonable efforts to give the Irrigators reasonable advance notice in writing of any changes in the design of the facilities being constructed after the associated Irrigators have reviewed and approved the designs pursuant to this Agreement

E. Construction

1. Parties understand that, due to funding limitations, Bonneville will not be solely responsible for funding all elements of the Manastash Project improvements listed above. Bonneville will fund each Manastash Project improvement to the extent possible up to the final BPA-approved funding level. The Parties intend that any remaining elements of the Manastash Project will be implemented using Ecology funds already available to the KCCD, up to the limit of those funds. Should the cost of constructing all facilities exceed the available funding through the KCCD and Bonneville, the Manastash Steering Committee shall work to locate and secure additional funding to complete the projects. Currently, the Parties expect that Bonneville will construct the Manastash Project improvements at the Consolidated Diversion and the Keach/Jensen diversion. The KCCD will construct one Manastash Project element using Ecology funds, the Barnes Road diversion. Bonneville and the KCCD will each be responsible for the facility or facilities that each entity constructs. Neither entity is responsible for the other's obligations.
2. Bonneville and the KCCD will coordinate the timing for their respective Manastash Project improvements with the Irrigators.
3. Bonneville and the KCCD shall give the Irrigators reasonable advance notice in writing of the place, date, and time of a final inspection of the construction of their respective Manastash Project improvement built under this Agreement. The Irrigators must make any objections to Bonneville's or the KCCD's performance in carrying out such construction at or before the final inspection. Any differences as to such matters shall be resolved, if possible, by negotiation and agreement of the parties.
4. By the time of the final inspection of the construction, Bonneville or the KCCD will leave the construction staging areas in a condition similar to that which existed prior to construction.

F. Access to Facilities.

1. The KCCD will assist BPA in obtaining all necessary and applicable access and occupancy easements, including temporary construction easements, for design, construction, operation, maintenance, replacement, monitoring, and evaluation of the Manastash Project improvements identified in Appendices H (Keach/Jensen) and I (Barnes) (except for the Kittitas County franchise agreement, which will be acquired and held by others) and for facilities, access routes, and construction staging areas shown in Appendix M. Bonneville will hold these easements and rights of way and transfer them to whatever entity or entities own the facilities at the time of project completion.
 - a. The real property acquisition activities shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, as amended, and regulations issued pursuant to that Act
 - b. Easements will generally be in the form of the sample included in Appendix K.
2. The Irrigators using the Consolidated Diversion agree to provide Bonneville easements over and across real property they own or otherwise control as necessary for the design, construction, operation, maintenance, replacement, monitoring or evaluation of the Manastash Project improvements described in Appendix G. Such rights easements shall be provided at no additional cost to Bonneville, the KCCD, or WDFW beyond the consideration provided by this Agreement.
3. The approved easements required in this section of the Agreement must be acquired before Bonneville solicits for construction contractors.

G. Facility Ownership.

1. With respect to all the Manastash Project improvements to be constructed under this agreement, Parties agree that Bonneville will retain title only to the following facilities:
 - a. The fish screens at
 - i. Barnes Road,
 - ii. Consolidated Diversion, and
 - iii. Keach/Jensen.
 - b. The concrete fish ladder adjacent to the screen at Barnes Road Diversion; and

- c. Other appurtenances to these fish screen facilities and the Barnes Road fish ladder necessary for their proper functioning, including, but not limited to, piers holding fish screens, up- and down-stream control gates, fish bypass pipes, trash racks, automated equipment, and security fences. See Appendix N for maps of the ownership boundaries at each facility.

BPA will not hold title to, own, control, possess or have any liability for the irrigation diversion/delivery features described below under Paragraph I.G.3. or any of the other Manastash Project improvements, including dams, stream grade controls or channel restoration features.

2. Title to the above named Manastash Project fish screen facilities and fish ladder, including those constructed by the KCCD under this Agreement, shall be vested in Bonneville for five (5) years beginning on the date of each facility's final construction inspection. All Parties acknowledge that Bonneville accepts ownership of these newly constructed facilities, easements, and rights-of-way only to facilitate their construction and seeks to divest itself of ownership expeditiously. Therefore, before the end of the second year of operation of each diversion facility, the Parties, convened by the Council and WDFW, will participate in developing a plan to (1) transfer ownership of the facilities to an entity or agency other than Bonneville or the Irrigators, and (2) establish operation and maintenance protocols. Each Party to this Agreement agrees to participate earnestly in such discussions in good faith and at its own costs.
3. Title to all other features of the Irrigators' irrigation facilities, including without limitation diversion dams, modifications thereto from the Manastash Project, gates, weir structures, measuring devices, diversion/conveyance canals, and other appurtenant structures shall be and remain vested in the current owners of the respective facilities subject only to the terms and conditions of this Agreement.

H. Instream Fish Passage Structures.

1. All parties desire to accomplish fish passage at the facilities in the most efficient manner to provide the greatest benefit. During the design phase, a cooperative decision was made to pursue "roughened channel" designs as opposed to more traditional concrete fish ladders at the Keach-Jensen and MWDA/Consolidated Diversion. This decision elevates the project beyond the minimum of meeting the state and federal passage criteria to agreeing on a solution that provides better habitat features and a more naturalized design.
2. Given the complexity of the design, construction and long-term monitoring required to achieve success, responsibility for these

structures is shared jointly amongst the parties. No individual party shall be solely responsible for these structures. The construction phase must be closely overseen by the design engineers. Long-term monitoring and maintenance is necessary for all fishways, regardless of type. For roughened channel fishways, determination of exactly what maintenance activities should occur requires a level of expertise similar to that required for the original design and engineering phase.

I. Facility Repair.

1. Bonneville Responsibilities

- a. Bonneville will be responsible for any extraordinary repair that exceeds normal wear-and-tear needed at each Manastash Project fish screen and ladder facility identified in paragraph I.G.1. in this Agreement for five years following the final construction inspection for that facility.
- b. "Extraordinary" repairs are those arising from natural causes in excess of normal wear-and-tear, but not including those repairs caused by negligence or other human causes.
- c. "Normal wear-and-tear" means typical, anticipated facility degradation that results from ordinary operations and that does not require more than the types of routine maintenance listed in paragraph I.I.3. below.
- d. Bonneville shall make such repairs to the Manastash Project fish screen and ladder facilities in a manner consistent with the Irrigators' valid water rights in a manner that does not unreasonably interfere with the exercise of their water rights.
- e. In the event of natural disaster—such as but not limited to flood, fire, or earthquake— affecting a Manastash Project fish screen or ladder facility during a five year period from the final construction inspection for each such facility, the affected Irrigators shall immediately notify Bonneville of the nature and extent of damage. The Irrigators may make emergency repairs of such damage up to seven-hundred fifty dollars (\$750.00) for labor, equipment and materials. Repairs exceeding said amount must have Bonneville's prior approval and authorization or Bonneville will have no obligation to repay the repair costs.
- f. Bonneville may contract with others for the performance of its duties under this Agreement. In case of default by the assignee(s), Bonneville shall be responsible for performance of their work.

2. Irrigator Responsibilities. Irrigators shall be responsible for any and all repairs, replacements, operation, and maintenance of facilities to which they hold title, as necessary to continue to divert water in accordance with their legal water right. Irrigators shall make any such repairs in a timely and prompt fashion where failure to do so would adversely affect the ability of the Manastash Project fish screen and passage facilities to operate properly and within state and federal guidelines.

J. Operation and Maintenance

1. The Irrigators shall operate and maintain their irrigation systems, including their diversion dams, headworks, and canals on or in which the Manastash Project fish screen and fish passage facilities are located, in a workmanlike manner and shall use reasonable care not to impair the operation and maintenance of the Manastash Project fish screen and fish passage facilities.
2. The Irrigators, or their agents, shall have the sole power and discretion and exclusive right to adjust and maintain control of waters flowing into their ditches and delivery systems through their respective headgates.
3. The Irrigators, or their agents, shall perform routine maintenance tasks as needed to assure proper and continuous operation of the Manastash Project fish screen and fish passage facilities. The Irrigators or their agents shall follow the routine operation and maintenance plan attached as Appendix L to this Agreement. Routine maintenance includes but is not limited to the following:
 - monitoring equipment for maladjustment, distress, wear, or shutdown;
 - lubricating bearings and replacing shear pins;
 - resetting tripped breakers and restarting equipment;
 - clearing trash and debris from structures;
 - cleaning out silt deposits from behind the screens;
 - picking up litter and controlling weeds;
 - monitoring site security; and
 - making minor equipment repairs and adjustments.

During the first five years after the final construction inspection for each Manastash Project fish screen and fish passage facilities, the Irrigators or their agents are responsible to perform the routine maintenance and shall ensure that problems or malfunctions are reported timely to Bonneville. Any work performed shall be documented in a daily log provided by

Bonneville. Documentation shall include time started, time completed, a brief description of work done, equipment used, and the names of the person(s) performing the work.

4. The roughened channel structures at the Keach/Jensen and Consolidate/MWDA diversions require annual monitoring and adaptive management to ensure they continue to meet fish passage criteria. Annual monitoring will occur by persons qualified to determine whether the structures are meeting fish passage criteria. This may include licensed engineers or WDFW staff. Those determinations will be reported back to the Steering Committee, keeping the Steering Committee aware of the long-term function of these structures and allowing the Steering Committee to pursue additional funding if major improvements are necessary to maintain fish passage.
5. The KCCD, through the aforementioned Ecology funding and with Ecology's approval, shall place \$75,000 in an account to be available for reimbursement to the Irrigators or their agents for proven costs incurred in the operation and maintenance of the fish screen and fish passage facilities at Barnes Road, Keach/Jensen and the MWDA/consolidated diversion. Dispersals are subject to Steering Committee approval. The Steering Committee shall work to replenish this fund as needed. Other than this provision of funding, KCCD is not responsible for maintenance or operations of any of the facilities.

II. Manastash Flow Enhancement Improvements

- A. The Manastash Steering Committee has collaborated to develop a consensus plan to enhance stream flows in Manastash Creek. This plan, called the Manastash Creek Restoration Project, Instream Flow Enhancement Implementation Plan ("Implementation Plan") includes measures as described in Proposal 2007-020-00, including water right purchase, on-farm efficiencies, conveyance and delivery piping or improvements, etc. The plan is attached as Appendix O.
- B. The Manastash Steering Committee has passed a resolution, included in Appendix O, signifying its concurrence in the Implementation Plan and its members commitment to implement the plan to address any outstanding concerns about flow levels in Manastash Creek to the extent that implementation of the fish passage measures under I. above can proceed.
- C. The Irrigators have requested and Bonneville expects to provide funding to begin to implement the Implementation Plan. Bonneville does not expect that actual implementation of all measures will be required as a condition for implementing fish passage measures under I. above.

III. General Provisions

- A. **Effective Date-Amendments-Termination.** This Agreement shall be effective from the date of the last Party to sign until renewed, amended, supplemented, terminated, or superseded by mutual written consent of the Parties thereto.
- B. **Compliance with State Law.** Compliance with this agreement does not exempt any party from compliance with Washington State law, including laws regarding fish passage and screening.
- C. **Attorneys' Fees.** In the event of litigation involving this Agreement each Party shall bear its own costs and attorney fees, including those incurred on appeal.
- D. **Notices.** Subject to the requirements of any applicable statute, any notices required or permitted by law or under this Agreement shall be in writing and shall be (i) personally delivered, (ii) sent by first class certified or registered mail, return receipt requested, with postage prepaid, or (iii) dispatched by facsimile transmission (accompanied with reasonable evidence of receipt of transmission and with a confirmation copy mailed no later than the day after transmission) to the Parties' addresses set forth below or in the Appendixes. Any party may change its address for notice. All notices which are so addressed and paid for shall be deemed effective when personally delivered, or, if mailed, on the earlier of receipt or two (2) days after deposit thereof in the U.S. mail.
- E. **Section Headings.** The word or words appearing at the commencement of sections and subsections of this Agreement are included only as a guide to the contents thereof and are not to be considered as controlling, enlarging or restricting the language or meaning of those sections or subsections.
- F. **Invalidity.** In the event any portion of this Agreement should be held to be invalid by any court of competent jurisdiction, such holding shall not affect the remaining provisions hereof unless the court's ruling includes a determination that the principal purpose and intent of this Agreement are thereby defeated.
- G. **Legal Relationships.** No partnership, joint venture or joint undertaking shall be construed from these presents, and except as herein specifically provided, no Party shall have the right to make any representation for, act on behalf of, or be liable for the debts of any others. No third party is intended to be benefited by this Agreement.
- H. **Assignment; Successors.** Subject to the restrictions contained herein, the rights and obligations of the Parties shall inure to the benefit of and be binding upon their respective estates, heirs, executors administrators, successors, successors-in-trust and assigns. Each of the Irrigators agrees to execute and record with the Kittitas County Auditor's office a "Notice of

Participation in Memorandum of Agreement Relating to Irrigation Water Diversion and Fish Screen Facility Ownership, Maintenance and Operation” in the form set forth on Appendix J, except that in the event any Irrigator or their Successor(s) no longer hold any water rights in Manastash Creek, then any obligations or responsibilities of that Irrigator or their Successor (s) under this Agreement shall terminate and this Agreement shall no longer be binding on that Irrigator or their Successor(s).

- I. Entire Agreement.** All understandings and agreements previously existing between the Parties, if any, are merged into this Agreement, which alone fully and completely expresses their agreement, and the same is entered into after full investigation, no party relying upon any statement or representation made by the other not embodied herein.
- J. Interpretation.** This Agreement has been reviewed by all the Parties and each Party has had the opportunity to consult with independent counsel with respect to the terms hereof and has done so to the extent that such Party desired. No stricter construction or interpretation of the terms hereof shall be applied against any Party as the drafter hereof.
- K. Counterparts.** This Agreement may be executed in counterparts, each of which shall be deemed to be an original instrument. All such counterparts together shall constitute a fully executed Agreement.
- L. Amendment.** This Agreement may not be modified or amended except by the written agreement of the Parties.
- M. Tort Liability.** Bonneville’s responsibility for any loss or damage to property, or injury to persons resulting from Bonneville’s acts or omissions, shall be in accordance with the Federal Tort Claims Act, 62 Stat. 982, as amended.
- N. Hold Harmless.** The Irrigators jointly and severally assume and will indemnify and hold Bonneville harmless against all environmental clean-up costs arising out of their acts and or omissions related to the operation and maintenance of the Project fish screen facilities. However, Bonneville shall be responsible for all environmental clean-up costs for releases of hazardous materials, petroleum products, or both, that occur during and as a result of the construction of the Project passage improvements.
- O. Dispute Resolution.** These dispute resolution provisions may be triggered by any Party to address issues arising in the implementation of this Agreement. If, however, any Party has served notice on any other pursuant to Section VII above, then the Parties shall agree in writing prior to any one referring any dispute between them to dispute resolution. The Parties may either mediate or arbitrate a dispute, but they may not do both.

1. If no Party has initiated litigation or mediation, any Party may initiate arbitration for any controversy or claim arising out of or relating to this contract, or the breach thereof. Arbitration shall be administered by the American Arbitration Association in its Seattle, Washington, office in accordance with its Commercial Arbitration Rules, unless the Parties agree to different rules. The arbitration will be done using a single arbitrator—unless the Parties agree to more than one arbitrator, following the Federal Rules of Civil Procedure, and with each Party paying its own costs and attorney fees and an equal proportion of all arbitration costs. There will be no discovery; however, if any Party receives information pertaining to the controversy or claim through anyone's use of the Freedom of Information Act with the Department of Energy or Bonneville, then, at Bonneville's option, other discovery shall be permitted and, if thus permitted at all, shall be opened fully to all Parties and follow the Federal Rules of Civil Procedure. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof. The Parties understand that WDFW and KCCD are subject to Washington State Public Disclosure Act and may be required to produce documents related to this agreement if a request for those documents is received.
2. If no Party has initiated litigation or arbitration, any Party may initiate mediation. The Parties agree that a controversy arising out of or relating to this Agreement shall be submitted to Judicial Arbitration and Mediation Service (JAMS), or its successor, for mediation. The Parties may commence mediation by providing to JAMS a written request for mediation, setting forth the subject of the dispute and the relief requested. The Parties will cooperate with JAMS and with one another in selecting a mediator from JAMS' panel of neutrals, and in scheduling the mediation proceedings. The Parties covenant that they will participate in the mediation in good faith, and that they will share equally in its costs and fees. All offers, promises, conduct and statements, whether oral or written, made in the course of the mediation by any Party, their agents, employees, experts and attorneys, and by the mediator or any JAMS employees, are confidential, privileged and inadmissible for any purpose, including impeachment, in any arbitration or other proceeding involving the Parties. There will be no discovery; however, if any Party receives information pertaining to the controversy or claim through anyone's use of the Freedom of Information Act with the Department of Energy or Bonneville, then, at Bonneville's option, other discovery shall be permitted and, if thus permitted at all, shall be opened fully to all Parties and follow the Federal Rules of Civil Procedure. The Parties understand that WDFW and KCCD are subject to Washington State Public Disclosure Act and may be required to produce documents related to this agreement if a request for those documents is received.

P. Contracting Authority. The Irrigators will provide Bonneville with documentation that meets Bonneville's satisfaction showing both the authority of each of them or their governing bodies to enter into this Agreement and their unqualified acceptance of it.

Q. Appendices. All appendices referenced in this Agreement are incorporated within it.

R. Condition. This Agreement is conditioned upon receiving the necessary funding to implement the actions identified herein.

IN WITNESS WHEREOF, the Parties to this Agreement have set their hands below.

Signed:

MANASTASH CREEK IRRIGATORS:

By: Nat Bland, President, Menastash Water Ditch Association

Date: 12/18/07

By: Clarence Harrell, Clarence Harrell

Date: _____

By: Jay Anderson, Jay Anderson, Anderville Farms

Date: 12/18/07

By: Carroll R. Richards, Carroll Richards

Date: Dec. 18, 2007

By: Larry Bland, Larry Bland

Date: 12-18-07

By: Brian Mellergaard, Brian Mellergaard, Circle Lazy H

Date: 12/18/07

BONNEVILLE POWER ADMINISTRATION:

By: OT Delwiche, Vice President Environment, Fish and Wildlife

Date: 12-17-07

By: Margaret H. Wolcott, Manager Real Property Services

Date: December 18, 2007

WASHINGTON STATE DEPARTMENT OF FISH AND WILDLIFE:

By: Jeff Taylor, Regional Director

Date: 12-18-2007

KITTITAS COUNTY CONSERVATION DISTRICT

By: Mark A. Moore, Chair

Date: 12/19/2007

WASHINGTON ENVIRONMENTAL COUNCIL

By: John K., Director

Date: 12-18-2007

List of Appendices

- A: Manastash Water Ditch Association water right holders and diversion identification
- B: Keach/Jensen water rights holders and diversion identification.
- C: Hatfield Diversion water rights holders and diversion identification.
- D: Reed Diversion water rights holders and diversions identification.
- E. Anderson Diversion water right holders and diversion identified.
- F. Barnes Diversion water right holders and diversion identified.
- G. Construction design for new Consolidated Diversion.
- H. Keach /Jensen construction design for new diversion.
- I. Barnes Road construction design for new diversion.
- J. Irrigators' Notice of Participating in MOA for O&M
- K. Sample easement
- L. Non-Federal Parties Operation and Maintenance Plan
- M. Legal Descriptions for Construction Easements for all Manastash Improvement Projects
- N. Facility Ownership Drawings
- O. Manastash Creek Restoration Project Instream Flow Enhancement Implementation Plan and Manastash Steering Committee Resolution.